(4)

No. 84-68

In the Supreme Court of the United States

October Term 1984

KERR-McGEE CORPORATION,

Petitioner,

v.

NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Bruce D. Black
CAMPBELL, BYRD & BLACK
Suite 1, 110 North Guadalupe
P.O. Box 2208
Santa Fe, New Mexico 87501
Telephone: (505) 988-4421
Counsel for Texaco, Inc.

Alan L. Sullivan
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Suite 1600, 50 South Main Street
Salt Lake City, Utah 84144
Telephone: (801) 532-3333
Counsel for Phillips Petroleum Company, Shell Oil Company and Chevron U.S.A., Inc.

Clark R. Nielsen
NIELSEN & SENIOR
1100 Beneficial Life Tower
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Counsel for The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, and Anadarko Production Company

100

No. 84-68

In the Supreme Court of the United States

October Term 1984

KERR-McGEE CORPORATION,

Petitioner,

v.

NAVAJO TRIBE OF INDIANS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Phillips Petroleum Company, Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, Anadarko Production Company, and Texaco, Inc., respectfully submit this brief as amici curiae in support of petitioner Kerr-McGee Corporation's petition for writ of certiorari. The written consent of the attorneys for petitioner and respondents for the filing of this brief has been obtained and filed with the Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICI CURIAE

Phillips Petroleum Company, Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, Anadarko Production Company and Texaco, Inc., produce oil and gas from portions of the Navajo Indian Reservation in Utah under leases from the Navajo Tribe of Indians. If the Navajo Business Activity Tax and Possessory Interest Tax at issue in this case are ultimately upheld, these companies will, like petitioner, be required to pay those taxes.

The tribal leases under which these companies produce oil and gas on the Navajo Reservation were executed as early as 1947, and were all executed more than a decade before 1978, when the Navajo Tribal Council adopted the Business Activity Tax and the Possessory Interest Tax. The United States Department of the Interior approved the terms of each of these leases pursuant to 25 U.S.C. §§ 81 and 415 and the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396a *et seq.* For a period of up to thirty years, these amici have developed the oil and gas reserves covered by their tribal leases on the Navajo Reservation in Utah. All of these operations have been supervised in detail by the Interior Department pursuant to federal regulations promulgated under section 4 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §396d. *See* 25 CFR § 211.1 *et seq.* (1983). Amici paid millions of dollars in cash bonuses to the tribe to secure the leases; Phillips Petroleum Company, Shell Oil Company and Chevron U.S.A., Inc. alone paid the Navajo Tribe more than $3,000,000 in

bonuses for leases in Utah between 1953 and 1959. Since acquiring the leases, amici have paid the tribe federally approved royalties of between 12.5 percent and 40 percent of the value of oil and gas produced and saved. Over the past decade amici have expended substantial sums for new wells and for secondary recovery measures aimed at increasing the productive life of oil and gas wells on the Navajo Reservation.

The substantial investment of these companies was made on the assumption that the Secretary of the Interior would continue to supervise oil and gas development and operations on tribal lands. The decision below, *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597 (9th Cir. 1984), undermines that fundamental assumption of comprehensive federal supervision. It is now doubtful whether the Interior Department will be able, in the face of an independent tribal power of taxation, to guarantee the integrity of consensual relations between the tribe and energy producers who have spent millions of dollars developing tribal reserves.

Amici have themselves challenged the Navajo Business Activity Tax and the Possessory Interest Tax in litigation pending in the Tenth Circuit. *See Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983). The Tenth Circuit's decision in *Southland*, rendered August 22, 1983, held that federal law does not require the Secretary of the Interior's review of these taxes and that the tribe's taxing power over oil and gas lessees is not divested by federal authority. 715 F.2d at 489. On September 20, 1983, amici petitioned the Tenth Circuit for rehearing in the *Southland* cases and suggested that rehearing be held *en banc*. Our petition for rehearing is pending.

Amici thus have a direct and vital interest in the issues presented in Kerr-McGee Corporation's petition. The outcome of this case and of the *Southland* cases will determine the viability of amici's investments in the Navajo Reservation and will shape future decisions to undertake energy development of tribal lands throughout the United States.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit below that Secretarial approval is not a prerequisite to the validity of Navajo taxes on oil and gas property and production nullifies the explicit guarantee of federal oversight in 25 U.S.C. §396d. The Ninth Circuit's decision on this point also conflicts with this Court's assurances of continued federal supervision of tribal energy taxes. Unrestrained tribal taxation, besides undermining the assumptions on which producers undertook development of Navajo lands, will impose economic burdens felt on a national scale. The decision below will induce other tribes presently subject to federal supervision to shed that supervision and tax energy producers unconstrained by federal authority.

The decision of the Ninth Circuit that federal law has not divested the Navajo Tribe of its power to tax energy producers violates the established rule of federal supervision in the area. The result will be a patchwork

of taxes, varying arbitrarily from reservation to reservation, bearing no relation to any uniform federal policy.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE CONTROLLING ACT OF CONGRESS AND WITH THE ASSURANCE OF SECRETARIAL REVIEW OF TRIBAL TAXES IN *MERRION V. JICARILLA APACHE TRIBE*.

The Ninth Circuit held that neither the Indian Mineral Leasing Act nor the Indian Reorganization Act, 25 U.S.C. §461 *et seq.*, requires the Secretary of the Interior's approval of tribal taxes on tribal oil and gas lessees as a prerequisite to their validity. *Kerr-McGee Corporation v. Navajo Tribe of Indians*, 731 F.2d 597, 604 (9th Cir. 1984). In doing so, the Ninth Circuit ignored the necessarily comprehensive character of the Secretary's duties under the Indian Mineral Leasing Act and the importance of federal oversight where Indian tribes endeavor to tax oil and gas producers. The Ninth Circuit's decision conflicts with *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), in which the Court repeatedly emphasized that the requirement of Secretarial approval would continue to protect lessees against unfair and unprincipled uses of the tribal power to tax non-Indians.

The Ninth Circuit's decision on this point undermines the principles on which energy companies like amici based their decision to do business with the Navajo

Tribe in the first place. Amici and other energy companies undertook the investment necessary to develop oil and gas reserves on Navajo lands on the assumption that the Secretary of the Interior would supervise leasing and operations on those lands. This assumption was based upon the explicit guarantee of federal law. Section 4 of the Indian Mineral Leasing Act, 25 U.S.C. §396d, provides that all operations under any tribal oil and gas lease shall be subject to regulations promulgated by the Secretary of Interior. Although the proviso in section 2 of the Act, *id.* §396b, permits tribes organized under the Indian Reorganization Act to make oil and gas leases in accordance with their federally approved charters, no similar dispensation exists for tribes, like the Navajo, that have never organized under federal law. As to these tribes, Congress could not have made plainer its intention that the Secretary should exercise full control over the leasing and operation of oil and gas properties held in trust for the tribe.

The Secretary does not fulfill his obligation to supervise those operations effectively if he permits the government of the Navajo Tribe to manage in his place. In adopting taxes on energy producers' property and revenue, the tribe exercises the power to regulate those operations just as surely as if it were to dictate the terms and conditions of each if its leases. If, as the Ninth Circuit's decision below held, Navajo taxes become effective without Secretarial review, the tribe's power of regulation is unilateral and complete. It is, in short, the absolute power to drive producers from the reservation irrespective of their compliance with the very leases

whose terms were approved by the Interior Department decades ago. Amici by no means exaggerate in contending that Navajo taxing power, unfettered by the requirement of Secretarial review, threatens the considerable investment of these companies in the Navajo oil fields over the past three decades.

If the Ninth Circuit's decision is correct and the Navajo taxes do not require Secretarial approval, there apparently remains nothing but the tribal government's self interest to limit the extent of taxation. Traditional constitutional guarantees against confiscatory taxation may not protect energy producers against tribal excesses. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that, although local powers of tribal self-government are subject to federal legislative authority, such powers are not subject to the constraints of the Fifth Amendment). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (holding that the provisions of the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.*, do not authorize private causes of action for violations of its guarantees against tribes or their officers). Moreover, because non-Indians are excluded from participating in the government of the Navajo Tribe, traditional political constraints on tribal taxation of energy companies are nonexistent. There is no representation within the Navajo Tribal Council for the very parties required to bear the greatest burden of these tribal taxes.

It is therefore important that *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), emphasized the continued dominance of federal supervision over tribal

mineral taxes. In *Merrion*, the Court held that the Indian Mineral Leasing Act "does not prohibit the Tribe from imposing a severance tax on petitioners' mining activities pursuant to its revised constitution, *when both the Revised Constitution and the ordinance authorizing the tax are approved by the Secretary*." 455 U.S. at 148 (emphasis added). The Court observed that the Jicarilla Apache Tribe's authority to tax nonmembers is "subject to constraints," including that "the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect." *Id.* at 140. The Court then said:

> These additional constraints mimimize the potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

Id. at 141.

The decision of the Ninth Circuit below and the decision of the Tenth Circuit in *Southland* (now pending reconsideration) both omit any mention of *Merrion's* constraints against tribal excess. Quoting *Southland*, the Ninth Circuit held that "[t]he self-sufficiency of the Navajo Tribe could be impaired by the imposition of a requirement of secretarial approval of its actions as to taxes." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 604 (9th Cir. 1984). These decisions miss four facts central to the dispute between the Navajo Tribe and energy producers.

First, economic burdens on oil and gas production from the Navajo Reservation will be felt far beyond the

boundaries of the Navajo Nation. The Navajo Tribal Council has characterized the Navajo Nation as "a principal supplier of crucial energy resources critical to the development of the United States economy." [1] As well it might. Between 1968 and 1975 Navajo Tribal lands yielded more than 100 million barrels of oil, more than 64 million tons of coal, and more than 105 million cubic feet of natural gas. The Utah portions of the Navajo Reservation have produced more than 200 million barrels of oil and more than 210 billion cubic feet of natural gas since the Utah Division of Oil, Gas and Mining began to keep production records in the early 1950's. The sheer scale of energy development on Navajo lands engages the national interest in maintaining a critical domestic source of energy. Although Secretarial approval of Navajo energy taxes would impose limits on the tribe's powers of self-government, the stakes for the nation as a whole are too high to permit Navajos the unsupervised power to choke energy development with oppressive taxes.

Second, the right of reservation Indians to "make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), is not infringed merely because their tax revenues might diminish as the result of some lawful restraint. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980) (holding that the State of Washington would not infringe the tribes' right of self-government by depriving the tribes of revenue which they were cur-

[1] "Navajo Energy Policy", adopted by the Navajo Tribal Council as Resolution CAP-34-80 (April 29, 1980).

rently receiving). To the contrary, tribal sovereignty is subordinate to the policies of the national government. As the Court said in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978):

> Upon incorporation into the territory of the United States, the Indian Tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.

Third, without Secretarial approval of tribal energy taxes, there exists no constraint against the unprincipled exercise of the power to tax and no assurance that tribal taxes will be consistent with the national policies implemented in the Indian Mineral Leasing Act. If the "series of federal check-points" referred to in *Merrion*, 455 U.S. at 155, are absent, then the Navajo Tribe will be left at large to manipulate for its own purposes the leasing program that Congress entrusted to the Secretary's care.

Finally, the Secretary's responsibility to regulate "all operations under any [tribal] oil, gas or other mineral lease," 25 U.S.C. §396d, must include, at a minimum, the duty to review tribal taxes that threaten the viability of leases approved by the Secretary and might terminate operations undertaken in accordance with federal regulation. The Indian Mineral Leasing Act is "the comprehensive law covering mineral leases on unallotted lands." *F. S. Cohen, Handbook of Federal Indian Law* 328 (G.P.O. ed. 1940). In earlier decisions, lower federal courts have broadly construed the Secretary's duties

under similarly comprehensive Indian legislation. *See, e.g., Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 548 (1983); *Udall v. Littell*, 366 F.2d 668, 672-73 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967); *Armstrong v. United States*, 306 F.2d 520, 522 (10th Cir. 1962).

A number of these amici conduct oil and gas operations on lands of tribes organized under the Indian Reorganization Act and are subject to tribal taxes on energy production which have been reviewed and approved by the Secretary of the Interior. For example, Phillips Petroleum Company produces oil and gas from the Jicarilla Apache Reservation in New Mexico, where it is subject to the tribal severance tax upheld in *Merrion*, and from the Blackfoot Reservation in Montana, where it is similarly subject to a Secretary-approved tax on production. If the decision of the Ninth Circuit is permitted to stand, these organized tribes are implicitly encouraged to shed their organized status.[2] If the constraint imposed by Secretarial approval does not apply to unorganized tribes, tribes like the Jicarillaa Apache and the Blackfeet may naturally choose to take steps to eliminate the constraint. The result for amici and other energy producers would be a patchwork of tribal taxes, shaped by the desires of a multitude of sovereignties, completely outside the control of the Interior Department.

[2] Federal regulation permits tribes to revoke their constitutions and bylaws on a majority vote. 25 CFR §81.7 (1983). Unless the existing constitution provides otherwise, revocation does not become effective until it is approved by the Secretary of the Interior. Id.

Certainly this result does not square with Congress's mandate that *all* oil and gas operations on tribal lands are to be subject to Secretarial control. Nor does this result square with *Merrion's* assurance that Secretarial review would continue to restrain tribal taxing authority. It was clearly Congress's intent to encourage tribes to organize under the Indian Reorganization Act. But the Ninth Circuit's decision discourages them from doing so and in fact motivates previously organized tribes to revoke their federally-approved governments.

II. THE DECISION BELOW CONFLICTS WITH THE ESTABLISHED PRINCIPLE OF FEDERAL DIVESTITURE OF TRIBAL SOVEREIGNTY

The Ninth Circuit also held that the Indian Mineral Leasing Act did not divest the Navajo Tribe of its power to tax oil and gas producers. *Kerr-McGee Corp. v. Navajo Tribe of Indians, supra*, 731 F.2d at 601. The court below reached this conclusion on the grounds that (1) the purpose of the Act "was not to generate distinctions" between tribes organized under the Indian Reorganization Act, whose taxing authority was not divested, and tribes not so organized, and (2) nothing in the Indian Mineral Leasing Act mentions tribal taxation. *Id.* The consequence of the Ninth Circuit's decision will be the elimination of federal policy as the guiding principle for tribal energy development outside the Indian Reorganization Act.

The decisions of this Court have repeatedly held that the overriding interests of the national government,

and particularly the comprehensive enactments of Congress reflecting the national interest, divest tribal sovereignty as a power subordinate to the federal authority. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe, supra*, 435 U.S. 209 (1978). As the Court said in *Washington v. Confederated Tribes of the Colville Indian Reservation, supra*, 447 U.S. at 152-53:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain *unless divested of it by federal law or necessary implication of their dependant status.*
>
> * * *
>
> *This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government* . . . .

Id. (emphasis added).

In *Merrion*, the Court considered at length petitioners' argument that the Indian Mineral Leasing Act divested the Jicarilla Apache Tribe's power to impose an oil and gas severance tax. The Court held that the Act did not divest the tribe's taxing power because of section 2's explicit exception, for the benefit of organized tribes, to the general rule of federal dominance. *Merrion v. Jicarilla Apache Tribe, supra*, 455 U.S. at 148. The implication of the Court's analysis is that other tribes — those without Secretary-approved governments under the Indian Reorganization Act — do not retain the power to regulate their own oil and gas leasing through taxation. Any other result would erase Congress's distinction between organized and unorganized tribes and would

undermine the goals that Congress intended to advance in making the distinction.

Congress's express purpose in enacting the Indian Mineral Leasing Act was "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." H. R. Rep. 1872, 75th Cong. 3d Sess. 1 (March 3, 1938). That goal was advanced in the case of organized tribes by the requirement of prior Secretarial approval of tribal resolutions affecting the leasing of oil and gas property. *See Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981), *cert. denied*, 459 U.S. 916 (1982) (stating that the Act gave organized tribal governments "control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary"). In the case of tribes not so organized, the goal can only be met by the continued supervision of the federal authority over oil and gas leasing and operations. If tribes having no authority from Congress are left unsupervised to tax the business or property of their lessees, the effective burden on lessees will vary arbitrarily from reservation to reservation, and a uniform national policy will cease to be a reality. The Secretary's prescription of uniform terms of compensation in tribal leases and his exclusive power to fix higher rates of royalty[3] will become irrelevant if

[3] 25 CFR §211.13 (1983) prescribes a per acre lease rental of $1.25 and a royalty of 12½ percent in all tribal leases. The same regulation provides, however, that "[a] higher rate of royalty may be fixed by the Secretary of the Interior or his authorized representative, prior to the advertisement of land for oil and gas leases."

unregulated tribes, with no authority from Congress, may exact taxes at will.

Navajo taxation is at odds with continued orderly development of tribal resources under the leasing plan envisioned in the Indian Mineral Leasing Act. The power of the Navajos to tax producers is the power to drive producers from the reservation — despite the will of Congress and despite the Secretary's approval of the producers' leases. This was the essential point of the Attorney General of the United States when he concluded in 1824 that the Cherokee Nation had no right to impose a tax on federally licensed traders:

> [I]f the Cherokee nation have the right to tax at all, the quantum of the tax rests in their sole discretion. If they have a right to impose a tax of $50, they have the same right to impose a tax of $500, $5,000, or $50,000 . . . The treaties having given to Congress the right to create these regulations of trade, a power to destroy them is a wholly incompatible power; and a power to tax, as the Supreme Court has said, is, virtually, a power to destroy.

1 Op. Att'y Gen. 645, 650 (1824). In short, the Attorney General concluded, the power of tribes to tax transactions committed to federal regulation is wholly inconsistent with Congress's supreme authority:

> The question is whether a right on the part of the Cherokee nation to tax the traders thus licensed on the part of the United States be compatible with that sole and exclusive right to regulate the trade from which the authority of the license proceeds? The imposition of the tax on the traders is the imposition of a new condition, on which alone the Cherokees say that this trade shall be carried on. It is a new regulation of the trade instituted by them, while the sole and exclusive power to regulate it is acknowledged by the treaties to be in the Congress of the United States. Is this sole and exclusive power in Congress consistent with the existence of a like power in a separate and independent sovereign, directed by a different judgment and a different will? I apprehend not.

Id. at 562. The Interior Department has repeatedly reaffirmed the correctness of this opinion since 1824. *See, e.g.*, 55 I.D. 14, 48 (1934); 60 I.D. 176, 180 (1948); *Interior Department Handbook of Federal Indian Law* 886 (Official ed. 1958).

The federal interests advanced in careful regulation of oil and gas production on tribal lands are, we submit, expotentially more significant than the government's interests in Indian trading. Unregulated economic burdens on the development of the vast reserves underlying the 14 million acre Navajo Reservation will pose grave risks to the tribe, to the producers, and to the public, which buys the energy produced from the Navajo reservation. The Navajo taxes are not only inconsistent with the principle of federal regulation; these taxes may well undermine the most fundamental goals of federal regulation.

CONCLUSION

For the foregoing reasons, these amici respectfully urge the Court to grant Kerr-McGee Corporation's petition for writ of certiorari.

Respectfully submitted,

Alan L. Sullivan
VAN COTT, BAGLEY,
CORNWALL & McCARTHY
Suite 1600, 50 South Main Street
Salt Lake City, Utah 84144
Telephone: (801) 532-3333
Counsel for Phillips Petroleum Company, Shell Oil Company and Chevron U.S.A., Inc.

Clark R. Nielsen
NIELSEN & SENIOR
1100 Beneficial Life Tower
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Counsel for The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, and Anadarko Production Company

Bruce D. Black
CAMPBELL, BYRD & BLACK
Suite 1, 110 North Guadalupe
Santa Fe, New Mexico 87501
Telephone: (505) 988-4421
Counsel for Texaco, Inc.

July 31, 1984